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Supreme Court of the United States

OCTOBER TERM, 1962.

Docket No. 940

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY and S. STEWART CROSBY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF

FOR RESPONDENT DUN & BRADSTREET, INC. SUED HEREIN AS THE BRADSTREET COMPANY IN OPPOSITION.

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The Opinions Below.

The opinions below are printed in petitioner's appendices A and B. The opinion of the Court of Appeals appears in 312 F. 2d 483.

Question Presented.

Respondent, Dun & Bradstreet, Inc., sued herein as The Bradstreet Company, is unable to accept the questions formulated by petitioner as correctly representing the questions in this case.

Petitioner misconceives the controlling question involved in this litigation.

The controlling question is:

> Whether a United States District Court in a diversity case in which plaintiff sought damages for and an injunction against the publication of a libel, acted in excess of its power and jurisdiction in making an order enjoining respondent Dun & Bradstreet, Inc., a mercantile agency, from issuing *any* report with respect to plaintiff and others (*not* parties to the litigation), whether defamatory or not defamatory, to which Dun & Bradstreet, Inc. consented by stipulation of settlement.

Statement of the Case.

An order was made on July 8, 1933 by the Honorable William Bondy (pages 5a, 6a of appellant's appendix in Court of Appeals). The order was made in an action pending in the United States District Court for the Southern District of New York, commenced in the Supreme Court of the State of New York, New York County and transferred by defendant on diversity grounds alone to the District Court. Plaintiff was S. Stewart Crosby (respondent here) and defendant was The Bradstreet Company (now Dun & Bradstreet, Inc. and respondent here). The order provided that the action was settled and discontinued and

> "Ordered, that the defendant, The Bradstreet Company and its successors, Dun & Bradstreet, Inc. *refrain from issuing or publishing any report, comment or statement either in writing or otherwise* [emphasis added] concerning S. Stewart Crosby [a respondent here], the plaintiff herein, L. Lloyd Crosby [not a party to the action and petitioner here], Henry A. Grossberg, Bernard Crosby, DuPree Freres, Inc., and the American Fur Breeders Co-operative Marketing Association Inc. or concerning

> the business activities of any of the foregoing persons or corporations, whether present, past or future."

Petitioner was not a party to this litigation and the injunction insofar as it favored him may well have been for that reason[1] in excess of the power and the jurisdiction of the court. *California* v. *San Pablo &c. Railroad*, 149 U. S. 308, 314 (1893).

This order was made upon a stipulation signed by the attorneys for the parties to the action (respondents S. Stewart Crosby and Dun & Bradstreet, Inc., pages 6a and 7a of appellant's appendix in Court of Appeals). Their stipulation, in addition to providing for the making of the aforesaid order, provided for the payment by defendant (respondent here, Dun & Bradstreet, Inc.) to plaintiff (respondent here, S. Stewart Crosby) of $300 and the furnishing of releases by said plaintiff in favor of said defendant.

The *complaint*, which was probably before the court when making the aforesaid order, appears to be unavailable to any of the parties.

In an affidavit submitted by S. Stewart Crosby in support of the application for an order terminating or dissolving or annulling the order of the court dated July 8, 1933, it is stated (page 30a of appellant's appendix in the Court of Appeals):

> "'The libel complained of in 1932 was not a report that I had been indicted and acquitted but a report that I had been found guilty and sentenced. Had such a report been published regarding my brother, it would have been true. He was in no position to complain of libel against him. It was I who complained of the false report concerning me. In the circum-

[1] As well as for the reasons outlined hereinafter on pages 6, 7, and 8.

> stances set forth in my petition the suit for a judgment in my favor was utilized by my brother to procure, by a stipulated order, a shield for himself from the truth as it related to him. I verily believe that I am under neither moral nor legal obligation to continue that shield for my brother in perpetuity and that, in the circumstances in which now I find myself, my rights as the sole plaintiff herein should not be obstructed by heeding my brother's objections. I verily believe that he is not a party entitled to be heard and, moreover, his grounds of opposition are not such as to commend themselves to the favor of the court."

The other papers on file are the answer of defendant, a copy of which appears at pages 1a to 5a of appendix of respondent Dun & Bradstreet, Inc. in the Court of Appeals and the petition for removal of the case from the Supreme Court of the State of New York to the United States District Court for the Southern District of New York, indicating that the removal was made upon the ground of diversity of citizenship of the parties to the action and the order of July 8, 1933.

Defendant's *answer,* before the court when making the aforesaid order, in paragraph 6 thereof admits that on the request of *one* of its subscribers it delivered a copy of the report referred to in paragraph 5 of the complaint.

For a complete affirmative defense it is alleged that defendant is a mercantile agency employed by its subscribers to compile information with respect to the estimated financial worth of certain corporations, firms and individuals doing business in the United States and Canada and to furnish such information to its subscribers upon their inquiry therefor pursuant to its subscription agreement to be held by such subscribers in strict confidence and not to be revealed

to others and that, under these circumstances, it furnished to *one* of its subscribers, in good faith, in confidence, without malice and on a privileged occasion, the report referred to in paragraph of the complaint marked 5.

For a partial defense it is alleged that the report referred to in the complaint was in error in stating that:

> "The finding of the jury was to the effect that Stanley Grossberg [S. Stewart Crosby, respondent in this court] was guilty of fraud."

and that as soon as it learned that such statement was in error it voluntarily recalled the report and advised the subscriber in regard to the error contained therein.

In other words, the wrong complained of was eliminated immediately and without apprehension of repetition, before the making of the order of injunction.

Reasons for not Granting the Writ.

The petition for certiorari should be denied because under Rule 19 of the Rules of the Supreme Court relating to "Considerations Governing Review On Certiorari", the petition for certiorari is without merit. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1922).

The petition for certiorari is not "certworthy". (Mr. Justice Harlan, *Manning the Dikes*, 13 Record of the Association of the Bar of the City of New York, 541, 549, 553, 561 (1958).)

The questions sought to be reviewed by petitioner are not of general importance.

The fact that the appeal before the Court of Appeals is claimed to have been wrongly decided is no ground for the granting of certiorari.

There are no special and important reasons for review.

There is no conflict of decisions among the lower federal courts on a point of federal law.

Argument in Support of Reasons for Not Granting Writ.

Courts from early times generally and traditionally have taken the view that, at least in the absence of independent grounds of equitable jurisdiction, equity will not assume the power and the jurisdiction to issue an injunction restraining the publication of a statement defamatory of a plaintiff.

Honorable Reuben H. Walworth, Chancellor of the State of New York, in *Brandreth* v. *Lance*, 8 Paige Ch. (N. Y.) 24, 27 (1839), stated the rule with respect to the lack of power or jurisdiction of equity to issue any injunction restraining the publications of defamatory statements:

> "The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property."

And at page 28 the Chancellor stated:

> "As the publication of the work, therefore, which is sought to be restrained, cannot be considered as an invasion of the rights either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, *this court has no jurisdiction or authority to interfere for his protection* [emphasis added]. And if the defendants persist in their intention of giving this libellous production to the public, he must seek his remedy by a civil suit in a court of law; or by instituting a criminal prosecution, to the end that the libellers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise."

Courts have concluded that they are without the power or the jurisdiction to restrain the publication of defamatory statements (as here) even though the defamatory statement may affect a plaintiff in his business or his property *except* where the defamatory statement was merely an incident of a larger situation held to present a proper case for the intervention of equity. *Brandreth* v. *Lance*, 8 Paige Ch. (N. Y.) 24, 27 (1839); *Marlin Fire Arms Co.* v. *Shields*, 171 N. Y. 384 (1902); *Nann* v. *Raimist*, 255 N. Y. 307 (1931); *Wolf* v. *Gold*, 9 AD 2d (N. Y.) 257, 259 (1st Dept. 1959), rearg. and appeal den., 10 AD 2d (N. Y.) 561 (1st Dept. 1960); *American Malting Co.* v. *Keitel*, 209 F. 351 (CCA 2d 1913); 28 Am. Jur. *Injunctions*, §§133, 134 (1959); 36 Am. Jur. *Mercantile Agencies*, §12 (1941).

The principal grounds for equity's declination to assume the power and the jurisdiction to restrain the publication of defamatory statements are the traditional limitations of equitable power and jurisdiction to the protection against the invasion of property rights as distinguished from personal rights.

And courts of equity have declined to assume the power and the jurisdiction to enjoin defamatory statements on the grounds that actions for damages or criminal prosecution[2] are adequate remedies.

Apprehension that the potentiality that courts of equity assuming the power and jurisdiction to restrain the publication of a defamatory statement might assume to violate the constitutional rights of freedom of speech and press and the right of trial by jury, has contributed to the declination by courts of equity to assume the power and the jurisdiction to restrain the publication of defamatory statements.

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[2] Penal Law of the State of New York, Article 126, §§1340, 1341, 1342.

Here it is fundamentally significant that the injunctive order of July 8, 1933 provided for the restraint of the publication of any statements even those which were not defamatory, and even those statements made with good motives in good faith on justifiable occasions.

Certainly the court of equity should not assume the power and the jurisdiction to restrain publication of statements which are not defamatory in the absence of collateral and independent grounds for equitable jurisdiction.

Indeed, plaintiff could not properly have asked the district court to restrain the publication of statements which were not defamatory in the circumstances indicated by this record.

Chief Judge Lumbard, speaking for the Court of Appeals, stated (312 F. 2d 483, 485):

> "Lloyd Crosby [petitioner here] contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him. We disagree. We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information."

Petitioner's argument that respondent, Dun & Bradstreet, Inc., by having consented to the entry of the order of injunction has waived any protection guaranteed by the First Amendment to the Constitution, misconceives the point. The point is that courts are without the power or the jurisdiction to make an order of injunction against the publication of a defamatory or true statement in the absence of special circumstances not present here. The fact that courts have refused to assume the power and the jurisdiction to make an order of injunction against such publication has

been occasioned, among other considerations noted hereinabove, by the apprehension that the assumption of such power and jurisdiction might be abused in restraining in advance the publication of communications, oral or written, true or untrue, thereby abridging the rights of freedom of speech and of the press. There are other reasons as indicated hereinabove why courts of equity have declined to assume the power and the jurisdiction to enjoin the publication of defamatory statements.

While a constitutional provision designed solely for the protection of the personal rights of a citizen may be waived, this does not mean that a court of equity has the power or jurisdiction to enjoin the publication of a defamatory or non-defamatory statement, in the absence of special circumstances warranting injunctive relief. See cases referred to on page 7 hereof.

The argument made by petitioner at pages 8 and 9 of his petition that the decision by the Court of Appeals is directly in conflict with *In Re George F. Nord Bldg. Corporation*, 129 F. 2d 173 (CA 7 1936); cert. den., 317 U. S. 670, and *United States* v. *Swift & Co.*, 286 U. S. 106 (1932), is without substance.

There is no conflict between *Nord* and this case. In *Nord* the injunction was not against the making of a defamatory statement. The order there was made by the court upon the confirmation of a plan of reorganization under the Bankruptcy Act, 11 USCA, to preclude any action which might in any way interfere with the carrying out of the plan so approved by the court. The provisions of the order with respect to the communications to creditors of the debtor were made "to protect the plan of reorganization" and to prevent interference with that plan. *Nord* is not in disagreement with this case nor with the cases referred to on page 7 hereof. In *Nord* there were collateral and

independent grounds warranting the issuance of an injunction, *i.e.*, the protection of the rights of creditors in having the plan of reorganization approved by the court executed without unapproved interference.

In *Swift* the decree enjoined the continuance of a combination in restraint of trade and commerce. "Monopolies and Combinations in Restraint of Trade, 15 USCA §1 *et seq.* It has no application here.

At page 9 of his petition, petitioner refers to anti-strike agreements and the enforcements thereof. Cases in the labor field are of no significance here, in view of the fact that injunctions against strikes or picketing are usually issued in connection with larger situations presenting facts held to warrant injunctive relief collaterally and independently, as in the federal cases referred to by petitioner.

Lack of Jurisdiction May not be Waived.

The question of lack of jurisdiction or the exercise of jurisdiction beyond the power of the court may be raised at any time. *McGrath* v. *Kristensen*, 340 U. S. 162, 167 (1950); *Manning* v. *Ketcham*, 58 F. 2d 948, 949 (CCA 6th Circuit, 1932).

The stipulation of the parties providing for the granting of the injunction did not confer the power or the jurisdiction on the court to grant the injunction. *Revona Realty Corp.* v. *Wasserman*, 4 AD 2d (N. Y.) 444, 447 (3d Dept. 1957); rearg. and appeal den., 8 AD 2d (N. Y.) 751 (3d Dept. 1959). The parties to the stipulation so providing are not estopped. *Cooper* v. *Davis*, 231 App. Div. (N. Y.) 527 (3d Dept. 1931); *Matter of Will of Walker*, 136 N. Y. 20, 29 (1892); *Matter of Dodge* v. *Supreme Court, State of N. Y.*, 249 App. Div. (N. Y.) 103, 110 (1st Dept. 1936), aff'd, 276 N. Y. 444 (1938).[3]

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[3] In a dissent not disapproved by the majority or by the Court of Appeals.

In 1 FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS, 734 [Fifth Edition 1925], it is stated:

> "Whether the court lacked power to act in the first instance by reason of its failure to acquire jurisdiction over the subject matter or the parties, or having been invested with such power, proceeded to make a determination outside or beyond the legitimate scope thereof, the result is the same. In either case the vitalizing element is lacking—the power to decide—without which no force or conclusiveness can be claimed for the judgment. Hence, though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightly exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction, even though the parties may have acquiesced or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 8, 1963

Respectfully submitted,

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sued herein as The Bradstreet Company.

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